IN THE

Supreme Court of the United States

October Term, 1979

No. 79-553

PARK WEST MANAGEMENT CORP.,

Petitioner,

-against-

ARTHUR and BESS MITCHELL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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The Respondents, Arthur and Bess Mitchell and four hundred other tenants residing in this middle-class apartment complex located in the Borough of Manhattan, City and State of New York, oppose the petition for a writ of certiorari made by petitioner herein to review the order and opinion of the Court of Appeals of the State of New York rendered on June 7, 1979.

STATEMENT OF THE CASE

This was the first case to reach the New York Court of Appeals involving the New York State Legislature's codification of the developing New York law concerning a landlord's warranty of habitability.

400 tenants ("Respondents") of Park West Village, a 2,500 family complex in New York City, were awarded an abatement

in their rents of ten (10%) per cent of one month's (average rent, $250 per month) rent because their landlord ("Petitioner") failed to supply vital and essential services for a three-week period, causing a health emergency.

The existing (then, and now) laws of New York State as well as the ordinances of New York City (N.Y.S. *Multiple Dwelling Law,* McKinney's N.Y. Laws, Vol. 35-a; *New York City Administrative Code,* Art. D, Ch. 26, §§D26-11.01 et seq.; New York City Administrative Code, (Rent Stabilization Law, Art. YY, Ch. 51, §§YY51-1.0 et seq.) required landlord to provide certain essential services including, but not limited to, garbage disposal, maintenance and other services relating to the public areas, and sufficient personnel to maintain the premises at the standard reasonably intended by the parties.

During the period involved (17 days), the landlord failed to comply with the requirements of those laws because it had failed to resolve a dispute between itself and its building employees, which resulted in sixty-seven (67%) percent of the landlord's labor force (67 porters and handymen) going out on strike.

As a result, landlord failed to meet its statutory burden to supply the essential services, and failed to meet its contractual obligation requiring the performance of said services as a necessary pre-requisite to demanding and retaining rent. Because of landlord's failure, the tenants were adversely affected, and were exposed to severe health-hazard conditions, rendering the premises unfit for human habitation and for the uses reasonably intended by the parties.

During the strike, the tenants were compelled to perform certain work and labor to protect their health and safety, as well as that of their families, including removal of garbage from the premises, cleaning the public hallways and lobby, stacking and removing garbage bags to the street curbs, and other tasks normally performed by their landlord. The buildings and the public common areas became infested with vermin and mice, as well as a stench causing nausea.

Management employees not on strike (administrative and supervisory personnel) did little or nothing to substitute as replacements for the missing porter and handyman staff, and the N.Y. Court of Appeals found that "given the severity of the conditions existing on the premises during the strike and the feeble attempts by petitioner to alleviate the dangers to the health and safety of the tenants, . . . " a 10% reduction in rent ordered by the Civil Court of New York City (Housing Court) was altogether proper, and held that such award should not be disturbed.

The New York State Supreme Court, Appellate Division, First Department (see Exhibit B, Petitioner's Brief, pp. 12a-21a) found as a matter of fact that there had been "a substantial deprivation of garbage disposal, janitorial and repair services for a 17-day period," and that such a situation involved the " . . . creation of conditions 'dangerous, hazardous or detrimental to . . . life, health or safety.' "

The Appellate Division (as affirmed by the State Court of Appeals) found untenable landlord's interpretation of the situation which would "require a tenant to pay the entire stipulated rent where the landlord has been unable to discharge its obligations under [State law] through no fault of either the landlord or the tenant." (Petitioner's Brief, p. 17a).

In arriving at their determinations in favor of the tenants, the New York State courts were required to consider the recently enacted (1975) state law governing the landlord's warranty of habitability. See N.Y.S. Real Property Law, §235-b [L. 1975, c. 597, §1] as reprinted in Petitioner's Brief, p. 3.

In discussing Section 235-b, the N.Y. Court of Appeals made the following comment:

> "In short, until development of the warranty of habitability in residential leases, the contemporary tenant possessed few private remedies and little real power, under either the common law or modern housing codes, to compel his landlord to make necessary repairs or provide essential ser-

> vices. Initially by judicial decision (citing cases) and ultimately by legislative enactment in August, 1975, the obsolete doctrine of the lease as a conveyance of land was discarded. Codifying existing case law, the enactment of section 235-b of the Real Property Law . . . placed "the tenant in parity legally with the landlord" . . . . A residential lease is now effectively deemed a sale of shelter and services by the landlord who impliedly warrants: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety." 418 N.Y.S.2d 310, at p. 314.

Landlord argued, among other things, in the Court of Appeals, that the lower state courts had committed error since "Real Property Law §235-b may not be applied retroactively to leases executed prior to August 1, 1975." (Petitioner's Court of Appeals Brief, p. 50 et seq.). While only a few of the tenants involved were subject to this argument (others of the tenants were in occupancy under leases dated subsequent to the effective date of R.P.L. §235-b, August 1, 1975), it is not clear that the Court of Appeals determined the case pursuant to R.P.L. §235-b. Since the tenants had argued in their brief (Respondents' Brief, N.Y.S. Court of Appeals, pp. 19-27) that they were entitled to an off-set in their rents with or without consideration of R.P.L. §235-b, and the Court of Appeals never quite ruled on landlord's contention, it is likely the Court of Appeals arrived at its determination independent of R.P.L. §235-b.

Since the Court of Appeals had concluded, as a matter of State law, that the statute codified "existing case law," and since the Court also relied on the "contracted-for rent" (Petitioner's Brief, p. 10a) as a basis for the percentage set-off, it cannot be definitely concluded that the Court's determination was based upon the statute. As the Court stated:

> "Hence, there is presented only the legal question of whether the conditions existing at Park West Village throughout the duration of the strike constituted a breach of the implied warranty of habitability." 418 N.Y.S.2d 310, at p. 315.

The Appellate Division opinion, however, dealt directly with landlord's argument, as follows:

> "The further argument that the section should be deemed inapplicable to provisions in leases signed prior to the enactment of the law also lacks merit. The section was unmistakably designed to codify and confirm a body of case law already in existence." (Petitioner's Brief, p. 18a).

Landlord's argument was that its "force majeure" clause exempted it from liability due to its failure to supply services, contending that such clause was applicable to the situation (Petitioner's Brief, p. 7). Although the N.Y.S. Court of Appeals did not directly pass upon such argument, the State Appellate Division did, as follows:

> "The suggested analogy to 'force majeure' provisions in commercial agreements is plainly inapposite here. Such provisions have been upheld to excuse the performance of a party under prescribed circumstances. They have not, however, been interpreted to permit the party excused from performance to receive compensation for that which he was unable to do, which would be the effective result of the application of that principle here." (Petitioner's Brief, p. 18a).

Landlord contends, in its petition (Petitioner's Brief, p. 13) that the "Court of Appeals in the case now under consideration has held ineffective the 'force majeure' clause in a contract executed two years prior to the effective date of the statute. Thus, its decision poses the question as to whether its construction of section 235-b infringes constitutional limitations imposed by the Contract Clause."

Although examination of the Opinion of the State Court of Appeals (Petitioner's Brief, pp. 1a-11a) fails to disclose that such was in fact its holding, the Court did construe the statute as placing "an unqualified obligation on the landlord to keep the premises habitable, . . . " and further concluded that within the scope of the "warranty" were included " . . . conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster . . . " (Petitioner's Brief, p. 7a).

Landlord's sole "constitutional" argument was stated in its State Court of Appeals Brief, pp. 56-57, as follows:

> "Finally, it appears that were §235-b interpreted so as to retroactively void the lease clause relieving Park West from liability for loss of services due to a strike, it would be unconstitutional, in violation of Article 1, Section 10, Clause 1 of the United States Constitution . . . "
>
> "It is submitted that the statutory bar against waivers of the warranty of habitability in residential leases (§235-b(2)) can only be applied prospectively. No other construction is warranted by the legislative history and a retroactive construction thereof would render §235-b(2) unconstitutional. Thus, Clause 28 of the lease remains effective as to all leases executed prior to August 1, 1975, . . . as a bar to any claim for damages resulting from the strike."

Landlord apparently believed, also, that the Constitutional question argued was not ruled upon by the State Court of Appeals. By Motion dated July 5, 1979, landlord applied to the State Court of Appeals seeking "amendment of the remittur to reflect the constitutional issues raised and necessarily decided in the proceedings." (Landlord's Motion For Leave to Reargue, dated July 5, 1979, p. 1).

In said Motion, landlord stated as follows:

> "In awarding damages to respondents . . . the Court necessarily found that such retroactive application of the

statute was permissible, and that it would not violate appellant's [petitioner's] vested rights. In our view, this could only have resulted from a misapprehension of petitioner's argument . . . . Yet, in stating that the sole issue on this appeal was whether the conditions at the property constituted a breach of the warranty, it appears that the issue was overlooked." (Landlord's Motion, P. 10, State Court of Appeals).

"In the event that the Court decides not to grant appellant's [petitioner's] application for leave to reargue, appellant requests that the Court enter an order amending the remittitur to include a specific provision that the constitutional questions raised upon the appeal were necessarily decided by the Court." (Landlord's Motion, p. 12, State Court of Appeals.)

"Appellant [Petitioner] seeks amendment of the remittitur to preserve these constitutional questions for the purpose of possible application to the United States Supreme Court." (Landlord's Motion, p. 14, State Court of Appeals).

The motion was never ruled upon by the N.Y. State Court of Appeals as landlord withdrew said motion five days later.

REASONS FOR DENYING THE PETITION

Contrary to Petitioner's argument (Petitioner's Brief, p. 11), it is not clear that the New York Court of Appeals construed the subject statute (R.P.L. §235-b) retroactively, and therefore, it is not certain that any "unconstitutional" determination was made.

The Petition in support of the Writ of Certiorari hardly states a compelling case raising a "grave constitutional question." (Petitioner's Brief, p. 10).

Moreover, even if there were merit to Petitioner's "constitutional argument, the impact in New York State would be minimal, as the leases of the tenants in question who arguably might be involved have all expired and have been renewed. In fact, under the Rent Stabilization Law of New York (Ad-

ministrative Code of the City of New York, §§YY51-1.0 et seq.), tenants leases are for only one, two or three years and all would have expired at the latest in 1978. Landlord's argument, therefore, even if it had any merit at all, would for the most part be inapplicable to current residential leases, and therefore of no moment with regard to any potential future impact.

Landlord's contentions that the New York State Courts have engineered a "confiscation of private property" (Petitioner's Brief, p. 11) and that the warranty of habitability "imposes an inordinate burden upon the ownership and management of rental residential real property" (Petitioner's Brief, p. 12), are unsupported.

I.

THE CONTRACT CLAUSE DOES NOT REACH MERE ERRORS COMMITTED BY A STATE COURT WHEN PASSING UPON THE VALIDITY AND EFFECT OF A CONTRACT UNDER THE LAWS EXISTING WHEN IT WAS MADE.

The Contract Clause of the Federal Constitution is not directed against all impairment of contract obligations, but only as against such as results from a subsequent exertion of the Legislative power of the State. It does not reach mere errors committed by a state court (assuming validity to the argument by Petitioner that the N.Y.S. Court of Appeals committed error when it held that R.P.L. §235-b codified existing state law) when passing upon the validity or the effect of a contract under the state laws existing at the time the contract was made. Therefore, it has been held that even though such errors may operate to impair the obligation of contracts, they do not give rise to a Federal question. *Cross Lake Shooting and Fishing Club v. State of Louisiana,* 224 U.S. 632 (1912).

It cannot be said that the determination made by the N.Y. State Court of Appeals necessarily impliedly or expressly stated

that R.P.L. §235-b was determinative of the case at Bar, especially in view of the Court's determination and holding that said statute codified existing state law.

II.

THE CONTRACT IN QUESTION WAS NOT "IMPAIRED" WITHIN THE MEANING OF THE FEDERAL CONSTITUTION.

Landlord possessed no vested interest, by contract or otherwise, so as to permit it to deprive the tenants of essential services, thereby endangering the life, health and safety of the tenants, and simultaneously receive and retain the full bargained-for rental. It is therefore difficult to understand how its "contract" was "impaired unconstitutionally.

The landlord was always, even prior to the development of the contractual theory of warranty of habitability by the courts, required to supply janitorial services, maintenance services, garbage removal services, etc., by New York statutory law. The development of the warranty concept was essentially a remedy for tenants who had not been compensated when their unduly enriched landlords failed to provide services essential to life, health and safety.

It is the duty of this Court to determine for itself what the contract is between the parties, and whether it has been unconstitutionally impaired, but where the "statute . . . concerns the remedy and does not disturb the obligations of the contract," the determination by the State court should not be overturned. See, e.g., *Funkhouser v. J.B. Preston Company, Inc.*, 290 U.S. 163, at p. 167.

No New York State court had ever sanctioned a landlord's failure to deliver services required by law, nor had any Court exempted a landlord from its required statutory obligations because of any "force majeure" clause. In fact, at the time of the execution of the leases in question, New York law required

that in case of a breach of the implied warranty of habitability, the landlord would not be permitted to retain full rent. (See cases cited in Court of Appeals Opinion, Petitioner's Brief, p. 4a).

As this Court stated in *Funkhouser, supra:*

> ". . . when the action of the legislature is directed to the enforcement of the obligations assumed by the parties and to the giving of suitable relief for nonperformance, it cannot be said that the obligations of the contract have been impaired. The parties make their contract with reference to the existence of the power of the State to provide remedies for enforcement and to secure adequate redress in case of breach." 290 U.S. 163, at 168.

It cannot be argued that it is not within the competency of the legislature "to enact laws providing remedies for a violation of contracts" and "to alter or enlarge those remedies from time to time, . . . " *Waggoner v. Flack,* 188 U.S. 595.

And there is a wide difference "between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made." *Bernheimer v. Converse,* 206 U.S. 516 (1907), at p. 530.

In all cases, even where impairment can be said to be taking place, it is nevertheless a "substantial" impairment which must take place. "Every case must be determined upon its own circumstances." *Von Hoffman v. Quincy,* 4 Wall. pp. 553, 554, 18 L.ed. 409, 410. And "in all such cases the question becomes therefore, one of reasonableness, and one of that the legislature is primarily the judge." *Antoni v. Greenhow,* 107 U.S. 769, 775.

Furthermore, New York State has exercised its police power with respect to the maintenance of its housing standards for a long period of time, and such laws, even implied requirements in existing leases, have been held valid. See, e.g. *Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80 (1946); *Farrell v. Drew,* 19 N.Y. 2d 486 (1967).

As was stated in *Farrell v. Drew, supra:*

"It is likewise clear that the State may, in the exercise of its police power, provide for the curtailment of rent payments to landlords as a means of inducing them to eliminate dangerous housing conditions. (See, e.g., Matter of Department of Bldgs. of City of N.Y. [Soltzer], 16 N.Y.2d 915, 264 N.Y.S.2d 701, 212 N.E.2d 154, supra; Matter of Department of Bldgs. of City of N.Y. [Philco Realty Corp.], 14 N.Y.2d 291, 251 N.Y.S.2d 441, 200 N.E.2d 432, supra; Nordred Realties v. Langley, 279 N.Y. 636, 18 N.E.2d 38, cert. den. 306 U.S. 655, 59 S. Ct. 644, 83 L.Ed. 1053; cf. People ex rel. Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 130 N.E. 601, 16 A.L.R. 152, supra.) We have, in the past, upheld and applied statutes or regulations, not too unlike the one before us, which provide for (1) rent reduction (see Matter of F & M Realty Co. v. Gabel, 21 A.D.2d 853, 252 N.Y.S.2d 285, mot. for lv. to app. den. 14 N.Y.2d 490, 253 N.Y.S.2d 1028, 202 N.E. 2d 159), (2) partial rent abatement (see Nordred Realties v. Langley, 169 Misc. 659, 661, 7 N.Y.S.2d 903, affd. 279 N.Y. 636, 18 N.E.2d 38, cert. den. 306 U.S. 655, 59 S. Ct. 644, 83 L.Ed. 1053, supra) and (3) rent receivership. (See Matter of Department of Bldgs. of City of N.Y. [Soltzer], 16 N.Y.2d 915, 264 N.Y.S.2d 701, 212 N.E.2d 154, supra; Matter of Department of Bldgs. of City of N.Y. [Philco Realty Corp.], 14 N.Y.2d 291, 251 N.Y.S.2d 441, 200 N.E.2d 432, supra.)" 19 N.Y.2d 486, 492.

And merely because legislation affects an existing contract is not enough to render a statute unconstitutional. As Justice Fuld stated in *Farrell,* supra:

"If the legislation before us 'is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end' ", this court declared in the Philco Realty case (14 N.Y.2d, at pp. 297-298, 251 N.Y.S.2d at p. 446, 200 N.E.2d at p. 436), 'it may not be stricken as unconstitutional, even though it may interfere with rights established by existing contracts (Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 438, 54 S. Ct. 231, 240, 78 L. Ed. 413). It is 'fundamental' * * * that 'the state may establish regulations reasonably necessary to secure the

general welfare of the community by the exercise of its police power, although the rights of private property are [thereby] * * * curtailed and freedom of contract is abridged.' " And, after noting that contracts are made subject to the exercise of the State's power when justified, we went on to say that, whether this protective power of the State be treated as "an implied condition of every contract and, as such, as much part of the contract as though it were written into it" or as " 'an exercise of the sovereign right of the government to protect the * * * general welfare of the people * * * paramount to any rights under contracts between individuals' " (East New York Savings Bank v. Hahn, 326 U.S. 230, 232-233, 66 S. Ct. 69, 70, 90 L. Ed. 34), it is " 'settled law' " that " 'the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as * * * are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.' " (Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 437, 54 S. Ct. 231, 239). The remedial legislation challenged in the case before us [S.S.L. §143-b] is reasonably aimed at correcting the evil of substandard housing and may not be stricken as unconstitutional even though the means devised to accomplish that result may, to some extent, impair the obligation of the landlord's contract."

Petitioner's argument that the statute in question, as construed, rendered an unconstitutional taking because the statute was not a proper exercise of the State police power in the absence of an expressly stated "emergency," (Petitioner's brief is of no merit, p. 17).

While "emergency may furnish the occasion for the exercise of [police] power," *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, 426 (1934), it is equally true that "even in the absence of an emergency" (*People ex rel. Durham R. Corp. v. LaFetra,* 230 N.Y. 429, 445 [1921]), the power may be invoked. See *Veix v. Sixth Ward Assn.,* 310 U.S. 32, 37 (1940); *Manigault v. Springs,* 199 U.S. 473 (1905); *Nebbia v. New York,* 291 U.S. 502 (1934).

As this Court stated in *Allied Structural Steel Co. v. Spannaus,* relied upon by Petitioner (Petitioner's brief, p. 14):

> "In applying these principles to the present case, the first inquiry must be whether the state law has in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage." 438 U.S. 234, at pp. 244-45.

CONCLUSION

There being no clear Federal question presented, it seems inappropriate to exercise this Court's discretionary power with regard to landlord's application. Landlord has hardly been harmed when required to reduce rent in exchange for a reduction in legally required, and statutorily mandated services necessary to the life, health and safety of the tenants and, therefore, the general public.

Nor is it clear that any "impairment" of a contract is involved by the N.Y.S. Court of Appeals determination, let alone any "substantial" impairment, especially when the State's highest Court has determined that the statute simply codified existing law. Under such circumstances this Court has held that such a determination, involving merely the validity or effect of a contract under the existing state laws, even if wrongly held and operating to impair a contract, does not give rise to a Federal Question. *Cross Lake Shooting and Fishing Club v. State of Louisiana, supra.*

Even if the statute did not cofidy existing law, it is clear that it merely created a remedy for the enforcement of rights under already existing contracts, and the Legislature rightfully may create additional remedies to secure and redress parties to existing contracts.

There being no Federal question, let alone any "grave con-

stitutional'' question, it is respectfully requested that this Court deny landlord's application for a writ of certiorari.

Dated: Brooklyn, New York
November 19, 1979

Respectfully submitted,

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